# IJM Corp Bhd v Zamri bin Hj Ibrahim & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02–1635 OF 2011
CLEMENT SKINNER, ALIZATUL KHAIR AND ROHANA YUSUF JJCA
11 OCTOBER 2013

*Evidence — Documentary evidence — Admissibility of — Whether document part of company's records and admissible under s 73A(2)(a) of the Evidence Act 1950 ('Act') although maker not called — Whether officer in custody and control of company's records could testify to service of document — Whether document relevant under s 32(1)(b) of the Act for being made in ordinary course of business — Whether conduct of party relevant to show knowledge that vacant possession had been granted — Whether appellate court not barred by s 69(4) of the Courts of Judicature Act 1964 from forming own opinion on inferences made by trial judge*

The respondents entered into an agreement ('SPA') with the appellant to buy an almost-completed office unit ('the unit') in a building developed by the latter. Ten months later, the appellant notified the respondents by letter that the unit was completed and that it was ready to deliver vacant possession. The letter ('ID2') requested the respondents to settle all outstanding payments and outgoings failing which, pursuant to the SPA, the respondents were deemed to have taken vacant possession of the unit upon the expiry of 14 days from the date of the letter. Ten months after the certificate of fitness for occupation of the building was issued the respondents paid the appellant the full balance purchase price for the unit. The respondents failed to pay the service and insurance charges and quit rent and assessment ('the charges') for the unit claiming vacant possession of the unit had not been delivered to them. The appellant sued for recovery of the charges in the High Court. The respondents raised a counterclaim for liquidated and ascertained damages for late delivery of vacant possession. The trial judge allowed the counterclaim and dismissed the appellant's claim finding that vacant possession of the unit had not been delivered to the respondents. The judge refused to admit ID2 into evidence on the ground its signatory ('Goh Chye Hin') was not called as a witness and also because the appellant failed to show proof that ID2 had been posted. He also held the respondents' conduct showing they were aware of ID2 could not be relied upon to presume they had taken vacant possession of the unit. Goh Chye Hin did not testify at the trial because he had left the appellant. His portfolio was taken over by SP1 who, based upon the appellant's records, testified that ID2 was issued and served on the respondents although he was unable to produce proof of its posting.

**Held**, setting aside the High Court's decision, granting judgment as claimed to the appellant and ordering the amount paid under the counterclaim to be refunded to the appellant:

(1) The trial judge misdirected himself in not admitting ID2. Evidence of the existence of ID2 and its service was testified to by SP1 who relied on the company's records to which he had custody and control. He had taken over the matter from Goh Chye Hin whose whereabouts was not known. Pursuant to s 73A(2)(a) of the Evidence Act 1950 ('the Act') the court could, if satisfied that undue delay or expense would otherwise be caused, admit a document even if its maker was available but not called (see paras 14 & 13).

(2) ID2, being a notice to deliver vacant possession, was made in the ordinary course of business and was therefore relevant under s 32(1)(b) of the Act. SP1 testified that ID2 was sent to the respondents but he could not locate the proof of posting because his staff did not realise the significance of the proof until they encountered the instant case (see para 14).

(3) The conduct of the respondents was relevant to prove they were at all times aware of the notice in ID2 — the purchasers of other units in the building did not complain about not receiving notice for delivery of vacant possession for their units; it was inconceivable the respondents would have paid the full balance purchase price if they were not aware their unit had been completed and vacant possession delivered; subsequent to the payment of the balance purchase price the respondents asked the appellant to waive late payment charges imposed on them because of financial difficulties. All these were compelling reasons to show the respondents were aware vacant possession of the unit had been delivered (see paras 15–19).

(4) The Court of Appeal was not restrained by s 69(4) of the Courts of Judicature Act 1964 from forming its own opinion on the trial judge's conclusion as the findings of the trial judge were not specific findings of ostensible facts but facts which could be inferred from specific facts (see para 20).

(5) But for the trial judge's finding of non-delivery of vacant possession, there was no dispute about the appellant's claim as set out in its statement of accounts. The counterclaim, being premised on delay in delivery of vacant possession, stood dismissed (see para 21).

**[Bahasa Malaysia summary**

Responden-responden telah memasuki perjanjian ('PJB') dengan perayu untuk membeli unit pejabat yang hampir siap ('unit tersebut') dalam sebuah bangunan yang dimajukan oleh perayu. Sepuluh bulan kemudian, perayu

memberitahu responden-responden melalui surat bahawa unit tersebut telah siap dan bahawa ia sedia untuk menyerahkan milikan kosong. Surat itu ('ID2') meminta responden-responden menyelesaikan semua baki bayaran dan wang keluar dan jika gagal, menurut PJB, responden-responden dianggap telah mengambil milikan kosong unit tersebut apabila tamat tempoh 14 hari dari tarikh surat tersebut. Sepuluh bulan selepas sijil layak menduduki untuk bangunan tersebut telah dikeluarkan responden-responden telah membayar perayu baki penuh harga belian untuk unit tersebut. Responden-responden telah gagal untuk membayar caj-caj perkhidmatan dan insurans dan cukai tanah dan taksiran ('caj-caj') untuk unit tersebut dengan mendakwa milikan kosong unit tersebut tidak diserahkan kepada mereka. Perayu telah menyaman untuk mendapat balik caj-caj tersebut di Mahkamah Tinggi. Responden-responden telah menimbulkan tuntutan balas untuk ganti rugi jumlah tertentu dan ditentukan untuk serahan lewat milikan kosong. Hakim perbicaraan membenarkan tuntutan balas dan menolak tuntutan perayu kerana mendapati milikan kosong unit tersebut tidak diserahkan kepada responden-responden. Hakim enggan menerima ID2 sebagai bukti atas alasan penandatangannya ('Goh Chye Hin') tidak dipanggil sebagai saksi dan juga kerana perayu telah gagal menunjukkan bukti bahawa ID2 telah diposkan. Beliau juga memutuskan tingkah laku responden-responden menunjukkan mereka sedar ID2 tidak boleh digunakan untuk memberi andaian mereka telah mengambil milikan kosong unit tersebut. Goh Chye Hin tidak memberi keterangan semasa perbicaraan kerana dia telah meninggalkan perayu. Portfolionya telah diambil alih oleh SP1 yang, berdasarkan rekod-rekod perayu, telah memberi keterangan bahawa ID2 telah dikeluarkan dan diserahkan ke atas responden-responden meskipun dia tidak dapat mengemukakan bukti penghantarannya.

**Diputuskan**, mengetepikan keputusan Mahkamah Tinggi, memberikan penghakiman sebagaimana dituntut kepada perayu dan memerintahkan jumlah yang telah dibayar di bawah tuntutan balas dikembalikan kepada perayu:

(1) Hakim perbicaraan telah salah arah kerana tidak menerima ID2. Keterangan berhubung kewujudan ID2 dan khidmatnya telah diberi keterangan oleh SP1 yang bergantung kepada rekod-rekod syarikat yang mana dia mempunyai jagaan dan kawalan. Dia telah mengambil alih perkara itu daripada Goh Chye Hin yang tidak diketahui di mana dia berada. Menurut s 73A(2)(a) Akta Keterangan 1950 ('Akta tersebut') mahkamah boleh, jika berpuas hati bahawa kelengahan atau perbelanjaan tidak wajar tidak mungkin berlaku, menerima dokumen sekiranya pembuatnya sedia ada tetapi tidak dipanggil (lihat perenggan 14 & 13).

(2) ID2, suatu notis untuk serahan milikan kosong, telah dibuat dalam perjalanan biasa perniagaan dan oleh itu adalah relevan di bawah

s 32(1)(b) Akta tersebut. SP1 memberi keterangan bahawa ID2 telah dihantar kepada responden-responden tetapi dia tidak dapat mencari bukti penghantaran kerana pekerjanya tidak sedar kepentingan bukti itu sehingga mereka berhadapan dengan kes ini (lihat perenggan 14).

(3) Tingkah laku responden-responden adalah relevan untuk membuktikan mereka sedar pada setiap masa tentang notis dalam ID2 itu — pembeli-pembeli unit lain dalam bangunan itu tidak mengadu kerana tidak menerima notis serahan milikan kosong untuk unit-unit mereka; berikutan bayaran harga belian itu responden-responden meminta perayu untuk mengetepikan caj-caj bayaran lewat dikenakan ke atas mereka kerana masalah kewangan. Kesemuanya adalah alasan-alasan kukuh untuk menunjukkan responden-responden sedar milikan kosong unit tersebut telah diserahkan (lihat perenggan 15–19).

(4) Mahkmah Rayuan tidak dihalang oleh s 69(4) Akta Mahkamah Kehakiman 1964 daripada membentuk pendapat sendiri berdasarkan kesimpulan hakim perbicaraan kerana penemuan hakim perbicaraan bukan penemuan spesifik fakta kononnya tetapi fakta yang disimpulkan daripada fakta-fakta spesifik (lihat perenggan 20).

(5) Namun untuk penemuan hakim perbicaraan berhubung milikan kosong yang tidak diserahkan itu, tidak ada pertikaian tentang tuntutan perayu sebagaimana dinyatakan dalam penyata akaun. Tuntutan balas itu, yang berdasarkan kelewatan milikan kosong, adalah ditolak (lihat perenggan 21).]

**Notes**

For cases on admissibility of, see 7(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 1350–1371.

**Cases referred to**

*Allied Bank (M) Sdn Bhd v Yau Jiok Hua* [2006] 5 MLJ 145; [2006] 3 CLJ 27, CA (refd)

*Kubota Agricultural Machinery Sdn Bhd v Sharizan Sdn Bhd & Anor (Third Parties)* [2001] MLJU 71; [2001] 6 CLJ 59, HC (refd)

**Legislation referred to**

Courts of Judicature Act 1964 s 69(4)
Evidence Act 1950 ss 32, 32(1)(b), 73A, 73A(1), (2), (2)(a)

**Appeal from**: Civil Suit No 22–223 of 2009 (High Court, Pulau Pinang)

*JJ Chan (Shearn Delamore & Co) for the appellant.*
*Mohd Hanif (Zamri Ibrahim & Co) for the respondent.*

**Rohana Yusuf JCA (delivering judgment of the court):**

**[1]** This is an appeal against the decision of the High Court at Pulau Pinang, which came before us on 14 May 2013. The learned High Court judge dismissed the claim of the plaintiff/appellant and allowed the counterclaim by the defendants/respondents. We have allowed the appeal of the appellant and we now give our reasons for our decision.

BRIEF FACTS

**[2]** The appellant was the developer of a development project known as Wisma Pantai at Jalan Wisma Pantai, Kampung Gajah, 12200 Butterworth. The respondents are advocates and solicitors. By a sale and purchase agreement dated 6 May 1996, ('the agreement') they bought an almost completed office unit known as Unit 8-5 in a building ('the unit') in the said project for a purchase price of RM324,700. The respondents paid a deposit equivalent to ten per centum of the purchase price in the sum of RM32,470.

**[3]** On 9 October 1996, the appellant purportedly sent a notice to the respondents informing them that the unit was completed and that the appellant was ready to deliver vacant possession. In that letter the respondents were requested to settle all outstanding payments and outgoings, failing which, the respondents were deemed to have taken vacant possession of the unit upon the expiry of 14 days from the date of the said letter. Certificate of fitness in respect of the building was issued by Majlis Perbandaran Seberang Perai ('MPSP') on 26 November 1996.

**[4]** On 27 August 1997, the appellant sent notice of progress payment directly to the respondents' financier EON Finance Bhd, claiming for payment of the balance of the purchase price of RM292,000. The respondents through their solicitors Messrs Azham Halim & Nor Asiah's letter dated 17 September 1997 paid the appellant the full balance of the purchase price to complete the sale.

**[5]** The respondents did not pay the service charges, insurance charges, quit rent and assessment (the charges) in the sum of RM105,501.13 for the reason that vacant possession had not been delivered by the appellant. Despite repeated requests made by the appellant it remained unpaid. Hence the filing of this suit by the appellant.

**[6]** The learned judge dismissed the appellant's claim for the charges because he found that there was no delivery of vacant possession of the unit to the

respondents. He allowed the counterclaim of the respondents for liquidated and ascertained damages for the same reason, that is, that there was no delivery of vacant possession. The amount of the liquidated damages allowed pursuant to cl 7.04 of the agreement for late delivery of vacant possession of the unit is the sum of RM467,568 for the period between 1997 to 30 September 2001 together with interest and costs.

**[7]** The main issue before this court is whether vacant possession of the Unit had been delivered. This issue raises the question whether the notice of vacant possession dated 9 October 1996 (ID2) is admissible in evidence to prove that vacant possession had in fact been delivered to the respondents. This appeal will therefore turn upon our determination on whether the learned judge had correctly appraised the law and the facts before him when he refused to admit in evidence the notice of vacant possession dated 9 October 1996 in ID2. This had accordingly resulted in his finding that there was no delivery of vacant possession of the unit by the appellant to the respondents.

**[8]** Under the terms of the agreement any notice to be given, including notice for delivery of vacant possession must be in writing (see cl 9.19 of the agreement) and must either be sent by hand or by prepaid registered post to the last known address of the purchaser. Once the notice is given and upon expiry of 14 days the purchaser is deemed to have taken vacant possession under cl 7.05. It is the appellant's case that having served the respondent with the notice to deliver vacant possession dated 9 October 1996 and after the expiry of 14 days, vacant possession of the unit is deemed to have been delivered to the respondents.

**[9]** The notice of 9 October 1996 was not admitted by the learned trial judge and was marked as ID2 because its signatory Mr Goh Chye Hin was not called as a witness. The learned judge also found that there was no proof of posting of ID2 shown by the appellant. It was held by the learned trial judge that the appellant cannot rely upon the various conduct of the respondents indicating that they were very much aware of ID2 to prove that the notice was received and the unit was therefore deemed delivered. For these reasons he held that the respondents cannot be presumed to have taken delivery of the unit. In the circumstances he found that the appellant had not delivered vacant possession of the unit to the respondents.

**[10]** In considering the status of ID2 we note that Mr Goh Chye Hin had left the company and his portfolio was taken over by Mr Khoo Kah Hock (SP1). SP1 was then the senior manager of the appellant company. He testified relying on the appellant company's record. From the company's record he said ID2 was issued and was served on the respondents. He could not produce proof of

posting but he maintained that the notice in ID2 was indeed sent to the respondents. He confirmed so by checking it based on the system he had in his office.

**[11]** Learned counsel for the appellant contended that there was misdirection by the learned judge in rejecting ID2 in the light of ss 73A and 32 of the Evidence Act 1950. The appellant contended that the conduct of the respondents clearly show that the respondents were aware that vacant possession had been delivered, which would have supported the appellant's case that ID2 had in fact been sent to the respondents. He contended the failure of the learned judge to give weight to the conduct of the respondents is also another misdirection.

**[12]** We find merits in the submission of the appellant. Under s 73A of the Evidence Act 1950 (the Evidence Act) there are three circumstances under which a statement made in a document is admissible. They are:

(a) where the maker is called to testify;

(b) where the maker is not available, the proviso to sub-s (1) is satisfied; and

(c) Where the maker is available but not called as witness, under the circumstances found in sub-s (2)

**[13]** In the present appeal the maker of ID2 was not called to testify. Following s 73A(2)(a) of the Evidence Act the court may, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, admit a document even if the maker is available but not called. The evidence of the existence of ID2 and its service was testified to by SP1 who had relied on his company's records. SP1 testified that he was the person who took over from Mr Goh Chye Hin and was in charge of the matter. It would naturally follow that he was charged with custody and control of the records of the company. These records, as they had been shown, include ID2 to which SP1 had access. This court in *Allied Bank (M) Sdn Bhd v Yau Jiok Hua* [2006] 5 MLJ 145; [2006] 3 CLJ 27, held that a notice of demand issued by the bank's solicitor was admissible under s 73A even though the maker was not called to testify. The signatory to the notice of demand in the above case had left the firm and migrated to Australia. In the circumstances the Court of Appeal held that the trial judge would have discretion to admit such evidence in that case because the document was produced from the record of a law firm who had custody and control of it. In the case of *Kubota Agricultural Machinery Sdn Bhd v Sharizan Sdn Bhd & Anor (Third Parties)* [2001] MLJU 71; [2001] 6 CLJ 59 the documents which were made in the ordinary course of business used in commerce and trade were held relevant under s 32(1)(b) of the Evidence Act and can be admitted under s 73A because the maker cannot be produced without undue delay and expenses.

**[14]** SP1 in the present case confirmed that ID2 was from his company's record to which he had access and control. We are also of the opinion that ID2 being a notice to deliver vacant possession is a document made in the ordinary course of business and is therefore relevant under s 32(1)(b). In the light of s 73A in our view the learned judge had misdirected himself in not admitting the document since it formed part of the record of the company considering that the whereabouts of Mr Goh Chye Hin cannot be ascertained by the appellant. SP1 testified that ID2 was sent to the respondents but he could not locate the proof of posting because his staff did not realise the significance of this proof till they encountered this case.

**[15]** We do not agree with the learned judge that the presumption of service of ID2 cannot be based upon the subsequent conduct of the respondents. We find the subsequent conduct of the respondents relevant which would go to prove that the respondents were all the time aware of the notice in ID2.

**[16]** We find the following testimonies of SP1 revealing of the respondents' stand on the notice in ID2. Firstly, the building where the unit is located comprised a number of units purchased by other purchasers. According to SP1 none of the other purchasers had complained about not receiving the notice for delivery of vacant possession of their respective units. The other purchasers had been either in possession of their respective units or had rented them out.

**[17]** Secondly, it was not disputed that the respondents' financier EON Finance Berhad had paid the balance purchase price in full. The payment of the balance purchase price made was in the sum of RM292.000 through their solicitors, Messrs Azham Halim & Nor Asiah, by a letter dated 17 September 1997. This cannot happen without the knowledge and the instruction of the respondents. Further, the respondents would have known of this fact since they would have had to pay the monthly instalments for the loan in full and not for the sums so released progressively. Under the Second Schedule of the Agreement the balance of the purchase price would have to be settled only upon the delivery of vacant possession of the Unit. It is inconceivable that the respondents would authorise their financier to pay if they were not aware that the Unit was already completed and vacant possession had been delivered.

**[18]** Thirdly, about one month after paying the balance of the purchase price, the respondents vide their letter of 17 October 1997 appealed to the appellant for a waiver on the late payment charges imposed on them. In the said letter the respondents explained their difficulties in obtaining financing which had caused delay in their payment of the full purchase price. They said they were financially constrained because at that material time they were newly established as a firm and they needed funds for capital expenditure.

**[19]** In our view these are compelling reasons to show that the respondents were aware that delivery of vacant possession of the unit had taken place. The learned judge, if he had not misdirected himself, would have accepted that the notice of vacant possession had in all probability been given and that the respondents were fully aware of its existence and accordingly by virtue of cl 7.05, vacant possession would have been deemed delivered after 14 days.

**[20]** We are mindful that we are not at liberty to disturb findings of facts by a trial judge unless the finding is erroneous and is contrary to the weight of evidence or where there is failure of judicial appreciation of facts or law or that the error is so manifest that it had caused injustice to the appellant, all of which warrant appellate intervention. In our view the findings of the learned judge in the present case were not specific findings of ostensible facts but facts, which could be inferred from specific facts. For that reason we are not restrained by virtue of s 69(4) of the Courts of Judicature Act 1964 to form our own opinion on the conclusion.

**[21]** There is no dispute that the charges would be due but for the learned judge's finding of non-delivery of vacant position. The respondents did not dispute the amount owing as set out in the statement of accounts. The counterclaim of the respondents which was premised on the consequence of delay in the delivery of vacant possession should stand dismissed.

**[22]** Accordingly we made the following orders:

(a) We set aside the order of the High Court and we entered judgment for the appellant for the sum of RM105,501.13 (as at 31 December 2011) for the outstanding service charges, quit rent and assessment plus 4% interest from date of judgment at the High Court which was on 3 June 2011.

(b) We ordered the respondents to refund to the appellant the sum of RM470,744 being judgment sum of RM467,568 together with interest of RM3176 within 30 days from the date of decision.

**[23]** We awarded costs at RM40,000 to the appellant here and below with deposit paid by the appellant to be refunded.

*High Court's decision set aside, judgment as claimed to appellant granted and amount paid under counterclaim ordered to be refunded to appellant.*

Reported by Ashok Kumar